87-767

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMINA SOLIMAN,

Petitioner,

V

EBASCO SERVICES INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Whether it was error and abuse of discretion to deny it its entirety counsel fees and cost to prevailing party under 42 U.S.C. 2000 3 5 K, and to limit the award of prejudgment interest to a short period without any rational basis, and whether it was error for the U.S. Court of Appeals to dismiss the appeal and apply sanctions on appellant's attorney and disciplinary action when the appeal was supported by affidavit by appellant, when the judgment was assigned to counsel after it was paid by him to his client and when a motion to dismiss on lack of standing was previously denied by U.S. Court of Appeals, and when that issue was not before the U.S. Court of Appeals to deny a petition for rehearing en banc?

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White v. New Hampshire Department of Employment Security 455 U.S. 445.

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TO THE HONORABLE, THE CHIEF OF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT,

Petitioner Amina Soliman, and her attorney Omar Z. Ghobashy, Esq. attorney pray that a writ of certiorari issue of review the order of the United States Court of Appeals for the Second Circuit which dismissed the Appeal and imposed sanctions and disciplinary proceeding against appellant's attorney. This was appeal from an order of U.S. District Court, Southern District of New York (Judge Greisa), which denied counsel fees to prevailing plaintiff in a sex discrimination case, prejudgment interest after a Jury Verdict in her favor.

OPINION BELOW

The U.S. Court of Appeals failed to address the issues on appeal but instead,

incorrectly and contrary to the record (some of which was deliberately ignored by it), dismissed the appeal on the ground that it was taken by the attorney without authorization of plaintiff, and who had no standing to appeal the denial of this counsel fees, and prejudgment interest.

The Order denying the petition for hearing was made on 9/3/1987.

JURISDICTION

The Jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

STATUS INVOLVED

42 U.S.C. 2000 e (5) K

STATEMENT

The opinion of Court dated 6/30/1987 involves important Civil Rights issues:
It referred disciplinary procedure against attorney for appellant to U.S. District Judge, contrary to Rule 46(C) F.R.A.P., and

38 F.R.A.P. It refused to accept appellant's affidavit that she authorized the appeal, yet it readily accepted an unthorized letter sent to District Judge, declaring that an attorney have no standing when his client has assigned the Judgment to him after he paid it to her. It failed to decide the issue of counsel fees in a civil right cases (sex discrimination), denied by U.S. District Court and the issue of prejudgment interest and punitive damages. it decided the issue of authorization injected in appeal by appellee contrary to law, by not giving the appellant an opportunity to reply, by deciding an issue that was previously denied on Motion, and by reviewing matters that were inserted in Record without authority.

The procedure of attorney for appellee deprived appellant and her attorney for their right to respond. All briefs and

appendices of appellant were served and filed according to schedule, but appellee failed to file his brief. After the due date and contrary to Rule 31 (C) F.R.A.P., attorney to dismiss the appeal because of the issue of the letter of appellant or to extend his time to file a Brief. The date of Oral Argument was set for May 21, 1987. The motion was denied but appellee's time to file a brief was extended to May 11, 1987. Appellee's attorney, when filing his Brief on May 11, 1987, attached the letter of appellant. This was an unauthorized act by attorney of appellee as the subject matter of the letter was disposed or by the denial of his motion to dismiss the appeal. Appellee's attorney introduced to the Panel at Oral Argument matters outside the record, in violation of Rule 30, F.R.A.P. The Court, under these facts, should have

accepted appellant's affidavit instead of declining to accept it. The Court considered part of the papers submitted but not the appellant affidavits, after a letter by attorney for appellee requesting to impose sanctions on appellant because she authorized the appeal. (Thus appellee himself conceded that the appeal was authorized by appellant.) Appellee's attorney had urged the U.S. Court of Appeals to impose sanctions because the appeal is frivolous, not because it was unauthorized. The Court below stated that the appeal is frivolous because the attorney has not standing.

It is the appellant, not the appellee, who must raise that issue by motion. In this case, however, appellant submitted an affidavit and the appellant's letter to the panel, duly notarized.

With regard to other documents: The Court was advised that attorney for appellee had requested satisfaction of Judgement before he released the Judgement. That was obtained from appellant. The Court was aware that by the late filing of appellee's brief, appellant was denied a Reply, 28 (c) F.R.A.P., to be submitted in time for the panel to rebut the issues raised for the first time in appellee's brief and which were not part of the record.

Judge Griesa sent a Memo stating that it is not within his jurisdiction, and that appellant should communicate with the clerk of U.S. Court of Appeals.

When the Jury Verdict was reached, the appellant was personally advised of her right to appeal, and of errors by the U.S. District Court, such as dismissal of sex discrimination count without submitting the

issue to the Jury on Motion of attorney for appellee contrary to EEOC determination, not allowing direct examination of appellant to continue until he rules on issue of offering in evidence of EEOC findings in accordance to Federal Rules of Evidence which he excluded, failure to decide the issue of punitive damages.

The issue of counsel fee was submitted after verdict and was denied with leave to renew. The motion submitted at trial in presence of appellant was with her full knowledge and consent, and it was not opposed by appellee's counsel or the Court.

The fee arrangement was that she pays all expenses, and that attorney seek his fee from the Court. There is no contingency fee. The appellant did not pay any expenses which was paid by her counsel. Numerous problems arose on discovery. Appellant

maintained that since EEOC had brought an action on her behalf in U.S. District Court, Louisiana, there were depositions in New Orleans and New York. An attempt was made to gather all record of prior proceedings through EEOC and private counsel in Louisiana. This was very difficult, and a Motion was eventually made against EEOC and appellee for production of documents. Appellant's attorney finally received from EEOC, at considerable expenses, a large volume of papers. The motion agains EEOC and appellee was withdrawn.

Upon review of the papers, it became evident that attorneys for appellee had engaged in actions of obstruction of discovery, concealing evidence, and attempting to show a general layoff in 1980, which was proven to be untrue by EEOC.

Appellant was advised that the deposition of EEOC could not be used and it was necessary to conduct oral deposition of selected officials. Appellant indicated that she lacked the finds to pay for deposition. Accordingly, interrogatories and production of documents were made, which appellee failed to comply with.

When the list of ready cases was made several months before trial date, attorney for appellant contacted Judge Griesa's clerk to advise him that appellant desired a motion on issue of discovery. Appellant's counsel was informed that the Judge had directed the case to proceed to trial. On many occasions in conference, attorneys for appellee had requested time to depose appellant, but she was never deposed. The issue the frivolous affirmative defenses was raised, and a request for a motion to

the Judgement, they agreed to appeal only from post-judgement orders.

It became necessary that the Judgement be paid to appellant by ther attorney, and an assignment obtained and transmitted to attorney for appellee so that he pay the judgement to the attorney for appellant who had a charging lien against the Judgement.

By the time the assignment of the Judgement was made to the attorney, he not only became authorized to prosecute the appeal by affidavit of appellant, but he also became the interested party fully authorized to file and prosecute the appeal. Thus the documents submitted to Court, and to attorney for appellee, foreclosed any argument regarding the standing of appellant's attorney, and the authorization of appellant.

It is an error to question the full authority and right of an attorney, who had paid the Judgement to his client, had received an assignment and received no fee or disbursement from his client, to file and prosecute the appeal.

REASONS FOR GRANTING THE WRIT

The decision of the District Court and U.S. Court of Appeals, for the Second Circuit is in direct conflict with decisions of the U.S. Supreme Court and other circuits It is in conflict with the intention of Congress. These circuits have ruled that a prevailing party in a civil rights action is entitled to cousel fees under similar circumstances:

1st Cir: Arroya v. Barcello 765 F.2nd 275 (1985) Nadeem Helgemoe, 581 F.2nd 275 (1st Cir. 1978), in which it was stated that

plaintiff need not prevail on every issue so long as he succeeds on any significant issue to be a prevailing party entitled to counsel fees.

2nd Cir: A successful plaintiff entitled to attorney's fees, Gagne v. Town of Cenfiled, 734 F.2nd 702 (Conn. 1984).

3rd Cir: Cunningham v. City of McKeesport, 753 F.2nd 262 (1985), Cert. granted, 106 S. Ct. 3324, where it was held that the Court abused its discretion in applying negative quality multiplyer to attorney of successful plaintiff.

4th Cir: Robinson v. Lorillard Corp. (1981), 444 F.2nd 791, Cert. dismd. 404 U.S. 1006, 30 L.Ed. 2nd 655; 92 S. Ct. 573, Ganey v. Edwards 559 F.2nd 337 (1985) where the Court held that plaintiff is prevailing party on basis of success obtained not amount recovered. The jury awarded $1.00

nominal fee. This was a Civil Rights Action in which attorney's fees were awarded under 42 U.S.C. 1988 and cost under 54 F.R.A.P.

7th Cir: Hill v. Loisini, 767, F.2nd 332 (1985) Hamilton v. Daley, 777 F.2nd 1207 (1985).

8th Cir: Smakopee Adwakaton Sioux Community v. City of Prior Lake Mina, 771 F.2nd 1153 (1985) Cent. den., 106 St. Ct. 1185.

10th Cir: J. & J. Anderson v. Town of Erie, 767 F.2nd 1469 (1985), neither good faith, fact that action provides private benefit for plaintiff, or case was simple constitute special circumstances to justify denial of counsel fees to prevailing party in a civil rights action.

C.A.D.C: Laffey v. Northwest Airlines, 746 F.2nd 4 (1984) Cert. Den. 105 S. Ct. 3488, 87 L.Ed. 2nd 622.

This Court has decided this issue on Hemsley v. Eckhart (1983), 461 U.S. 424, 76 L.Ed. 2nd 40, 103 S.Ct. Gaslight Club Inc., v. Carey, 447 U.S. 54 (Cert. to second circuit, 1980), and White v. New Hampshire Department of Employment Security, 455 U.S. 445.

Certiorari is granted when U.S. Court of Appeals differed in their decisions. Donaldson v. U.S. 91 S.Ct. 534, 400 U.S. 517, 27 L.Ed. 2nd 580.

This decision involved important question of Civil Rights Act, an important Federal Statute and at least two U.S. Court of Appeals reached contrary results. U.S. v. Mariz, 83 S.Ct. 1850, 374 U.S. 150 10 L.Ed. 2nd 805 (N.Y. 1963).

This issue is also recurring and involves such an important question in which many Bar Associations and Civil Rights

organizations in many States are interested. U.S. v. Zacks, 84 S.Ct. 178 U.S. 59, 11 L.Ed. 2nd 128 (Cert. granted 1963).

That issue of importance regarding administration of Federal Statute, U.S. v. Article of Drug Bacto Uni disk 89 S. Ct. 1420, 394 U.S. 784 22 L.Ed. 2nd 726, rehearing den. 89 S.Ct. 2012, 295 U.S. 954, 23 L.Ed. 2nd 473. This Court granted Certiorari in Pierce v. Underwood 107 S. Ct. 2177 (87), 95 L.Ed. 2nd 834. Cert. to 6th Cir. 761 F.2nd 1342.

The decisions reflects misconception of the meaning of U.S. Supreme Court decision, Wilkinson v. U.S. 81 S.Ct. 567, 365 U.S. 399, 5 L.Ed. 2nd633, rehearsing denied 81 S. Ct. 1024 365 U.S. 890 6 L.Ed. 200.

Although at EEOC deposition in U.S. District Court action in Louisiana, it was established that there was no large scale

layoff in 5/1980 when plaintiff was employed, at trial, testimony was elicited of large scale layoff in May 1980. Thus the jury was led to believe that if appellant remained in employment she would have been discharged in May 1980 because of general layoff.

Thus the verdict which is based on back-pay from 11/79 to 5/80 minus employment, is not a result of failure of proof of plaintiff's case, but speculative factors that plaintiff could have been laid off with others in 5/1980. On the contrary, the male employee that EEOC had found sex discrimination in his promotion instead of plaintiff was transferred to N.Y.C. with many others and remained with defendant until 1985.

In N.Y. Gaslight Club Inc. v. Carey, 447 U.S. 54, this Court relied on Section 42

U.S.C. 2000 e-5(K), and stated at page 63 that "Because Congress has cast the Title VII plaintiff in the role of a private attorney general, vindicating a policy of the highest priority, a prevailing plaintiff ordinarily is to be awarded counsel fees in all but special circumstances. It is clear that Congress intended to facilitate the bringing of discrimination complaints. Permitting an attorney's fee award to one in respondent's situation furthers its goal, while a contrary rule would force the complainant to bear the cost. . .and therefore would inhibit the enforcement of a meritorious discrimination claim."

I. IT WAS AN ERROR TO DENY COUNSEL FEES AND COST IN ITS ENTIRETY UNDER 28 U.S.C. 2000 e 5K BY U.S. DISTRICT COURT AND FOR U.S. COURT OF APPEALS TO DISMISS THE APPEAL AS FRIVOLOUS WITHOUT REVIEWING THAT ISSUE.

There was no case found in U.S. District Courts, U.S. Court of Appeals or this Court in which a prevailing plaintiff's counsel was denied counsel fees. Most cases had the amount "Lode Star." See Walter v. City of Atlanta, 652 F. Supp. 755 (N.D. Ga, 1985) under 42 USC 2000 e 5(K), Real v. Continental Group, Inc. 653 F. Supp. 736 (N.D. Cal. 1987); Caleloras Enterprises v. Rivera Rios, 660 F. Supp. 540 (Puerto Rico, 1987), $110.00 an hour for associates, $125.00 for 2 partners and $200 for third partner in an Age Discrimination in Employment Act case was neither above market rate nor unreasonable, plaintiff as in this case prevailed in retaliation. $112,070.00 fees and $7300.00 Expenses was based on time expended and experience of attorney, Judge Kram, S.D. N.Y. 1987, 661 F. Supp. 254.

The Fourth Circuit ruled that awards of attorneys fees should ordinarily be included

as damages under Title VII, not only to penalize defendants for pursuing frivolous arguments, but to encourage individuals to vindicate the strongly expressed congressional policy against discrimination, Robinson v. Lorillard Corp., (1981), 444 F.2nd 791 Cert. Dismd. 404 U.S. 1006, 30L. Ed. 2nd 655, 92 S.Ct. 573.

In Fogg v. New England Tel. & Tel. Co., 1972, D.C.N.H., 346 F. Supp. 645, the Court awarded a reasonable attorneys fees and cost to a woman plaintiff even though no discrimination was found by EEOC and by the Jury.

The same effect, see Hicks v. Crown Zellerbach Corp. (La 1970), 319 F. Supp. 314. In Le Blan v. Southern Bell Tel. 33 F. Supp. 602, affirmed 460 F.2nd 1229 Cert. den. 409 U.S. 970 34L.Ed. 2nd 257, where the Court refused to grant injunctive relief for

unlawful employment discrimination, but it awarded considerable counsel fees.

The fact that plaintiff is the prevailing party is undisputed. There were two important findings by the jury which were controlling, and one of them was sufficient, dismissal of appellant because of sex discrimination, or dismissal of appellant because of sex discrimination, retaliation. The jury returned a verdict in favor of plaintiff on issue of retaliation.

The plaintiff achieved substantial success in findings of retataliation despite the conduct of attorneys for defendant in discovery by EEOC and in this action, and concealment of evidence. Nor was the one document offered in evidence which a supervisor recommended discharge on other grounds which was not acted upon. This document though sent to attorneys for

defendant was not disclosed to EEOC nor submitted to them in accordance to their request, not submitted in this case pursuant to notice to produce and interrogatories.

There were many elements of retaliation on which the Jury may have agreed.

Unlike the Hensley case, Hensley v. Eckerhart, 461 U.S. 424, there is no increase for enchancement, and sex discrimination and retaliation are not considered unrelated discrimination and retailiation are not considered unrelated claims. At page 68, the U.S. Supreme Court states:

> We also find no merit in petitioners suggestion that denial of a fee award was within the District Court's decision to deny a fee award to a prevailing plaintiff is narrow.

At page 451-452, the Court stated:

> Section 1988 provides for awards of attorneys fees only to a prevailing

> party. Regardless of when the attorney's fees are requested, the Court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the mertis. . . .the attorney's fees allowed under #1988 are not compensation for their injury giving rise to an action. Their award is uniquely separable from cause of action to be proved at trial.

See Hutto v. Finney, 437 U.S. at 695, N. 24.

II. PREJUDGEMENT INTEREST SHOULD HAVE BEEN ALLOWED TILL DATE OF VERDICT

In absence of liquidated damages, prejudgement interest should be allowed. Cline v. Roadway Express 689 F.2nd (4th Cir. 1982), Bendt v. Kaiser Aluminium and Chemical Sales Inc. 789 F.2nd 253 (3rd Cir. 1986).

While the District Court accepted the principle of pre-judgement interest, and there is no challenge to rate of interest, the Court set an irrational period without and support.

The Court accepted the defendant attorney's argument that the cutoff date should be the date the unjunction was dismissed in EEOC action in Louisiana. But the Court's acceptance of defendant attorney's argument that plaintiff slept on her rights until 1985 is invalid. Plaintiff could not bring an action until she is issued a right to sue letter by EEOC. The action must be commenced within 90 days from the date of this letter.

Since the Court accepted State rate of interest, it is from earliest ascertainable date the case of action existed #5001 N.Y. Civil Practice Law and Rules. The rate of interest under 5005 CPLR is 9% as adopted by the Court.

Pre-Judgement interest was awarded in N.L.R.B. v. American Warehouse, 374 F.2nd 573 (1967).

In Itdwell v. American Oil Co., (U.S.D.C., Utah, 1971) 332 F. Supp. 424, the prejudgement interest was from date of termination of employment. Said the Court:

> The purpose of title VII is to put the aggrieved party in same position as he would have been but for defendant's illegal interference with employer-employee relationship.

In N.L.R.B. v. Whitfield Pickle Co., 5th Cir. 1967, 374 F.2nd 523, the Court held that interest payments help effect a restoration of the situation as nearly as possible to that which would have obtained but for the illegal discrimination. See Phelps Dodge Corp. v. N.L.R.B., 1941

313 U.S. 177, 194 61 S. Ct. 845, 85 L.Ed. 177, and Cole v. Snow D.C. Mass. 1984, 588 F. Supp. 1386.

Since the U.S. District Court ignored the issue of punitive damages, it should have awarded pre-judgement interest, Brown v. Freeman Baking Co. 810 F.2nd 6 (1st Cir.) 1987.

III. IT WAS ERROR FOR U.S. COURT OF APPEALS TO DISMISS APPEAL AS FRIVOLOUS AND IMPOSE SANCTIONS ON PLAINTIFF'S ATTORNEY

This appeal was not only of denial of counsel fees but also raised the issue prejudgement interest. It was erroneous for the U.S. Court of Appeals to consider that the appeal is unauthorized when that issue was not before it on appeal, when there were affidavit submitted by appellant that it was fully authorized, and when the judgement was

paid by appellant's attorney to his client and assigned to him, and the assignment was duly served and filed, and when a satisfaction of judgement duly signed by appellant was tendered to attorney of appellee, at his request. To pay judgement to the attorney of appellant and when attorney for appellee acknowledged the above to the Court.

The U.S. Court of Appeals refers to a letter dated 5/15/1987 which it refused to consider its contents, as a breach of preargument conference confidentiality as to settlement. This letter was in response to letter of appellee's counsel and did not disclose that an actual offer of payment of counsel fees for plaintiff was made outside the conference, and not known to judicial officer, and was rejected because attorney for plaintiff would not abandon his client's

claim for prejudgement interest, as a conflict of interest.

The very purpose of prejudgement conference is to settle and narrow the issues. Therefore it is not a breach to disclose that judicial officer furthered the purpose of the conference. This letter of client to Trial Judge was disposed of in conference and the attempt of attorney of appellee to raise it by motion without disclosing it to judicial officer at conference is contrary to the officer's instructions. The motion was denied which showed that raising the issue was in bad faith and was for the purpose of delay.

The Trial Judge wrote to Appellant without knowledge or consent of her attorney (who was not discharged) that he has no jurisdiction and that he is to communicate with clerk of U.S. Court of Appeals. She

did not do that but instead, submitted affidavits in support of the appeal and that her attorney is fully authorized to appeal, of the post-judgement issues, counsel fees and prejudgement interest.

All these documents were annexed to petition for rehearsing en banc to U.S. Court of Appeals but was denied by the panel without opinion and not heard en banc.

While all the discussion in the decision on lack of standing of attorney to appeal, or that appeal is frivolous are not proper. It will be discussed since that Court relied on it in its decision.

The Party's right of self-presentation implies an obligation of the Court to protect pro-se litigants from inadvertment forfeiture of important legal rights because of lack of legal training -- McPartland v. American Broadcasting Company, 113 F.R.D.

(S.D.N.Y. 1984). Thus it was incumbant on attorney for appellant who represented her on her civil rights action without compensation, paying all expenses to protect her rights, not the Trial Judge and U.S. Court of Appeals and Appellee's counsel to forfeit her rights, and punish her attorney who is of her own national origin (Egyptian) and who is concerned about the client and her rights than appellee's counsel who requested sanctions against her that was opposed by her attorney, by the letter referred to in the decision which was accepted by U.S. Court of Appeals, which decided to apply sanctions agains her attorney, who did not wish her to incur counsel fees or disbursement and who paid the Judgement in full to her because of her financial attorney, who did not wish her to incur counsel fees or disbursement and who

paid the Judgement in full to her because of her financial need, and who is yet to collect the Judgement because of protractment of attorney for appellee.

It is a presumption that the attorney is fully authorized to enter into settlement or to continue to represent his client. Garabedian v. All State Engineering Co. 811 F.2nd 802. It is also settled that an attorney cannot withdraw unless terminated by Order of Court. Novinger v. E.T. Dupont DeNemours 809 F.2nd 212 (3rd Cir. 1987).

The Court ought to grant certiorari on the novel issue, Kossick v. United Fruit Co., (N.Y. 1961) 81 S.Ct. 886, 365 U.S. 731, 6L.Ed. 2nd 56, rehearsing den. 81 81 S.Ct. 1657, 366 U.S. 941, 6 L.Ed. 852.

An appeal is frivolous where substantive argument occupied one page and no cited case to support it, Calderon Oniverons v. INS,

809 F.2nd 1050. Is the appeal herein frivolous when the decision is in conflict with this Court.

In Novinger v. Dupont De Nemours (3rd Cir. 1987), 809 F.2nd 212 (chief Judge Gibbons stated that the Court had ancillary jurisdiction on attorney's fees and expenses. An appeal cannot be frivolous for purpose of attorney's fees. See Trevino v. Holy Sugar 811 F.2nd 986 5th cir. 1987; Christianberg v. Garmet 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed. 2nd 648 (1978).

No such showing was made that the issues raised are frivolous and it was not raised below.

In Donaldson v. Clark, 786 F.2nd 1570 (11th Cir. 1986), the Court denied sanctions because the Court did not give attorney for plaintiff an adequate opportunity to submit material in opposition to defendant's

motion. In Garcia-Franco v. INS, 748 F.2nd 518 (9th cir. 1984) the Court held that sanctions should not be imposed as counsel felt a legitimate legal issue and was attempting to protect his client's rights.

The 9th Circuit ruled that motion for sanctions should be made before appeal is perfected. In re Itel Securities, litigations 791 F.2nd 672 (9th Cir. 1986).

To hold attorney personally liable should be construed narrowly and with overt caution, Mone v. C.I.R. 774 F.2nd 570 (2nd cir. 1985) Knorr Brake Corp. v. Harbil, 738 F.2nd 223 (7th Cir.) Imposition of sanctions directly against attorney is subject to appellate review. Weisberg v. Webster, 749 F.2nd 864 (C.A.D.C.) 1984). There should be notice and a hearing before imposing sanctions on an attorney, Le Puck v. Van Wormer 765 F.2nd 86 (7th cir. 1985)

Cert. Den. Hyde v. Van Wormer 106 S.Ct. 86, 88L.Ed. 2nd 7). Any sanctions imposed on an an attorney which are neither immediate nor necessary to preserve order in Court must be imposed after the attorney is given an opportunity to be heard, (14th Amend.) Liener v. First National Bank of Atlanta, 751 F.2nd 713, Cert. granted Nix v. Whiteside 105 S. Ct. 2016, 85 L.Ed. 298, reversed 106 S.Ct. 988, 89 L.Ed. 2nd 123.

Where problems involved in appeal were unique, uncommon and previously solved, the appeal is not frivolous, Jaeger v. Canadian Bank of Commerce, 327 F.2nd 743 (64), Lake Utopia Paper v. Connelly Container, Inc. 608 F.2nd 928 (2nd Cir. 1979), Cert. Den. 100S. Ct. 1023, 444 U.S. 1076 62 L.Ed. 2nd 758, Miracle Mile Associates v. city of Rochester, 617 F.2nd 18 (2nd Cir.) Campbell v. Teledyne Mobil Offshore, Inc. 714 F.2nd

429 (5th Circ. 1983). In James v. Home Construction C. of Mobile, 678 F.2nd 1357, 1358 (11th cir. 1982), it was held that since a plaintiff acts as private attorney general, it is the attorney who is entitled to counsel fees and not the client, and these cases permits the attorney to proceed on his own. Falcone v. Hall, 235 F.2nd 860 (D.C.), J.B. Holdin Corp. v. U.S. 166 F. Supp. 324, Hoxey v. Hoffpauir, 180 F. 2nd 84, Cert. Den. 70 S. Ct. 841, 339 U.S. 953, 94 L.Ed. 1366. No saction should imposed if not in bad faith, Osleby v. RCA Corp. 752 F. 2nd 272 (C.A. Kansas 1981). It was error for U.S. Court of Appeals to assess sanctions under 28 U.S.C. 1927. Glass v. Pfeffer, 657 F.2nd 252. The Court could not combine 28 U.S.C. 2000 e5 (K) or 42 U.S.C. 1988, Monk v. Roadway Express Inc. 599 F.2nd 1378 (5th Cir. 1979), Cert. granted 100

S.Ct. 659, 444 U.S. 1012, 62 L.Ed. 2nd 640 aff. Roadway Express v. Piper 100 S.Ct. 2455, 447 U.S. 752 65 L.Ed. 2bd 488 (1980). There is noi award of sactions under Civil Right Act, 28 U.S.C. 2000 e 5(K) or 28 U.S.C. 1988 that Statute with 28 U.S.C. 1927. La Game v. University of Penn Medical School, 488 F. Supp. 1250. See also Galuci C. N.Y. Times, 533 F. Supp. 1011, S.D.N.Y. 1982 (Judge Edward Weinfield).

In Stevens v. Lawyers Liability Inc. Co. of North Carolina, 789 F.2nd 1056 (4th Cir.) it was held that the Court must judge attorney's conduct under objection standard of reasonableness rather than by subjective intent. The Courts are consistent that there must be instances of serious and studied disregard by an attorney before imposing sanctions and costs and there must be a finding of willful bad faith, Ford v.

Temple Hospital, 790 F.2nd 362 (3rd cir. 1986).

No Court had dismissed an appeal under similar circumstances. In Poulis v. State Farm Fire and Gas Co. 747 F.2nd 863 (3rd Cir. 1984) it was held that dismissal must be sanction of last not first resort.

Not only the appeal should have been dismissed, the unusual sanction of monetary, cost and referral to disciplinary proceeding is totally without basis as no sanctions should be applied unless the claim is entirely without color and is made for harassment or delay, Friegoog v. Axewood 593 F. Supp. 395 (N.Y. 84) which ruled that imposition of sanction against attorney was an abuse of discretion.

There is no question that it is presumed that an attorney who has represented a party is authorized to take

all action to conduct litigation, Terrain Enterprise Inc. v. Western Gas, 774 F.2nd 1320 (5th Cir. 1985) Cert. Den. 106 S.Ct. 163 90 L.Ed. 2nd 184, Valley Lines v. Ryan, 771 F.2nd 366.

An appeal of denial of counsel fees in Civil Rights cases cannot be frivolous. Trevino v. Holley Sugar Corp. 811 F. 2nd 896 (3rd Cir. 87) Novinger v. Dupont De Nemours 809 F.2nd 212 (3rd Cir. 87). Here the Court found that it has ancillary jurisdiction over attorney's fees and expenses. See Christianberg Garnet v. EEOC (Cert. to 4th Cir.) opinion by Justice Stewart, 434 U.S. 412, 985 S. Ct. 694, 54 L.Ed. 2nd 648 (1978), Commonwealth Oil v. EEOC, 720 F. 2nd 1382 (5th Cir. 1983), Stone v. Heckler, 658 F. Supp. 670, 111, 87.

A client does not have unqualified right to control action of counsel in a law suit,

Muttez v. Fayram, 626 F. Supp. 197 (Iowa, 85) Dismd., 786 F.2nd 110 (5th Cir.) The client was present in Court when application for counsel fees was made and it was submitted with her consent, and therefore an appeal from denial cannot be opposed by her, Weber v. Isreal, 730 F.2nd 499, Cert. Den. 105 S.Ct. 167.

A client is bound by acts of her attorney particularly when the continuation of law suit or appeal is threatened, Callip v. Harris County Child Welfare, 757 F.2nd 1513.

It is settled law that the primary responsibibility for preventing destruction of litigant's appellate rights was the lawyer. Abdulla Muhamed v. De Roberts, 788 F.2nd 1268 (C.A. 7/86). This involved civil rights 42 U.S.C. 1983, the attorney was referred to disciplinary proceeding because

he did not file Notice of Appeal. In the case at bar the attorney is referred to disciplinary proceeding and is sanctioned by fine and cost because he filed a duly authorized Notice of Appeal. In the case at bar the attorney is referred to disciplinary proceeding and is sanctioned by fine and cost because he filed a duly authorized Notice of Appeal. The Court stated "failure of attorney to ascertain if client filed Notice of Appeal. . .Certainly this element precaution should have been taken, and we hope will be in future to avoid forfeiture of procedural rights."

When issues are of first impression requiring Judicial resolution, and when District Court made no finding that action is frivolous, and when the record does not support any such finding, it is an error to determine the action frivolous. Thomas v.

Federal Bank of Indiana, 659 F. Supp. 421 (N.D. Ind. 1987).

The question of standing does not go to whether appeal should be heard but to its merits. So appeals should not be dismissed on ground of lack of standing. In re Pittsburg & L.E.R. Co. Securities and Anti-Trust Litigation, 543 F.2nd 1058.

The Court of Appeals has jurisdiction to hear an appeal by an attorney, Johnson v. Trueblood, 629 F.2nd 302 (3rd Cir. 1980). The rights of the attorney to appeal is recognized in Dietrich Corp. v. King Resources, 596 F.2nd 422 (C.A. colo 1979).

A surety could appeal even in absence of appeal by principal, U.S. for use and Benefit of Eddie Sales v. Federal Ins. Co. 634 F.2nd 1288. Certainly an assignee of a judgement, where assignment is filed with Court of Appeals has the right to

appeal. This was recognized by U.S. Supreme Court in Evans v. Jeff D, 106 S.Ct. 1531 (1986), page 1539, the language of the Act (Fees Act), as well as its legislative history indicates that Congress bestowed on "the prevailing party" (generally plaintiffs) a statutory elibility for discretionary award of attorney's fees in specified civil rights actions.

It legislated assignment of this right to an attorney such as effectively occurred here. At footnote 19, "the fee application be made by the attorney in name of the client, the prevailing party. We consider this to be the procedure of choice, since it ensures that awards made under the Act compensate their intended beneficiary."

In Sharon Moore v. National Association of Securities Dealers, Inc. 762

F.2nd 1093 (D.C. 1985), the Court discussed the strong presumption in favor of attorney's fees, in that the award provides an incentive to competent lawyers to undertake Title VII work only if the award compensates attorneys for the amount of work performed. The Court discussed the issue of standing of the attorney or his client to claim the fee. "It is the attorney who is entitled to fee awards. . .not the client." James v. Home Construction Co. of Mobile, Inc. 689 F.2nd 1357, 1358 (11th Cir. 1982); Maher v. Gagne, 448 U.S. 122, 126, 100 S. Ct. 2570, 2573, 65 L.Ed. 2nd 653 (1980) "fees awarded to 'respondent counsel.'" Simon v. Western Kentucky Welfare Rights 426 U.S. 450 (1976). The Court in the Moore or her counsel is the proper party to sue for fees."

In Kellogg v. Winchell (1921) 51 App. DC 17 273 F. 745, the Court held that an attorney had a right to prosecute an appeal from a Judgement, although the client objected on ground that the attorney was vested with an interest in the cause of action because of his contingency fee contract with the client.

In another case in which an assignment was made, the Court held that:

> Whether the assignment be sufficient to vest the absolute and perfect legal title to the Judgement on O'Donnell, clearly the plaintiff could not, after cause of action which had become merged in the Judgement, and thus compel the attorney to begin over anew in their effort to enforce their lien. The assignment, nevertheless gives the assignee such rights as ought to entitle him to have the sufficiency of the Judgement finally determined upon the appeal, especially where appellant joined in the submission thereof long after it now claims the cause of action was settled.

Argeropoulos v. Kansas City R. co. (1919) 201 Mo App. 287 212 SW 369. To the same effect see Counsaman v. Modern Woodman (1903) 69 Neb 713, 98 NW 414, where an attorney was permitted to prosecute an appeal over the objection of client to collect their fees. In Stilwell v. Armstrong (1899) 28 Misc. 546, 59 N.Y.S. 671, attorneys perfected an appeal whereupon defendant moved to withdraw from it and it was held that he was interested in the action to the extent of his contingency fee, the motion to withdraw was denied.

In Robinson v. Hunt (1947), 211 La 1019, 31 So 2d, 1907, a party moved to dismiss the appeal as unauthorized to extent of 80%, leaving 20% contingency fee, previously assigned to the attorney as his fee, the Court held that counsel may appeal from the Judgement. To the same effect, see

Acadian Production Co. v. Savana Corp. (1954), 266 La 849, 77 So. 2d 417.

In Werkan's Will (1940), 122 W. Va 583, 13 SE2d 73, it was stated that if a client fraudulently settles the case in order to deprive counsel of his fees, counsel may continue to prosecute the appeal. Thus, while Congress gave civil rights litigant the ability to retain civil rights attorneys by providing of counsel fees to prevailing party, it did not intend to deny these lawyers their civil rights, and the denial of their fees by an action of the party. Appellant attorney's right are protected by 42 U.S.C. 1981 (equal rights under the law) and right of appellant under U.S.C. 1982, to assign her property to her attorney.

In New York where attorneys have liens under 475 Judiciary law, the counsel

may prosecute an appeal to protect his right to fees without the consent of his client. This is the law in many states. See Fuller v. Lanett Bleaching Co. (1914), 186 Ala 117, 65 So 61, Kimbo Rough v. Pitta (1879) 63 Gal 475; Walker v. Equitable Mortgage Co. (1902) 114 Ga 862 40 SE 1010; Richmond County v. Richmond County Reformatory Institute (1914), 141 Ga 457, 81 SE 232; Corbin v. McCrary (1918), 22 Ga App 472 96 SE 447.

In these cases, the Courts held that counsel has a property right in the Judgement or such interest therein as will entitled him to oppose a motion to dismiss and where the litigation would result in Judgement in which counsel would have a lien for fees earned, plaintiff cannot withdraw the appeal over the objection of his lawyer.

Therefore, it is an error to determine this issue on unathorized

inclusion in the appeal of by appellee over the objection of the appellant by affidavit and conclusive evidence. Furthermore, appellant had opposed appellee's motion to dismiss on ground of unverified letter sent, which was clearly not pursued by an action in U.S. Court of Appeals. New York law does not permit a party to act on his/her own behalf where attorney appeared without consent of Court, CPLR 321 (a).

It is an error to question the full authority and right of an attorney, who has paid the Judgement to his client, had received an assignment and received no fee or disbursement from his client, to file and prosecute the appeal.

The U.S. Court of Appeals erred by imposing sanctions and cost on appellant's attorney. The Court asserted that lack of standing renders the appeal frivolous, but

lack of standing is a legal issue separate and apart from a frivolous appeal.

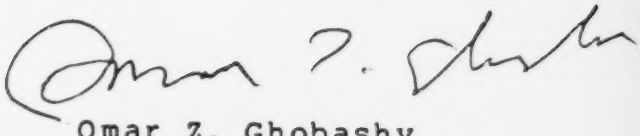
Thus, if the Court Appeals dismisses the appeal on lack of standing which is found to be an error, it cannot be equated with a frivolous appeal. The Court of Appeals overlooked the fact that an appeal is not frivolous because of lack of standing is raised, but it is frivolous when there is no legal authority to support it.

Nor is there an violation requiring referral of conduct of attorney for appellant to disciplinary procedure, contrary to Rule 46 F.R.A.P. The Court failed to examine the conduct of attorney of appellee and the record should be referred to EEOC to determine what action to take against attorneys for appellee for concealment of documents from a U.S. Agency.

CONCLUSION

For the foregoing reason, Certiorari should be granted.

Respectfully Submitted



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UNITED STATES COURT OF APPEALS

For The Second Circuit

No. 1165-August Term 1986

(Argued May 21, 1987 Decided June 30, 1987)

Docket No. 87-7146

AMINA A. SOLIMAN,

Plaintiff-Appellant,

-v.-

EBASCO SERVICES INCORPORATED,

Defendant-Appellee.

Before:

LUMBARD, MESKILL, and CARDAMONE,

Circuit Judges.

Appeal from denial of counsel fees of $15,000 sought under 42 U.S.C. 2000e-5(k) (1982) and from amount of prejudgement

interest awarded on a jury verdict of $5400 in the United States District Court for the Southern District of New York (Griesa, J.).

Appeal dismissed with sanctions imposed against plaintiff's attorney.

OMAR Z. GHOBASHY, New York, N.Y., for Plaintiff-Appellant Amina Soliman.

MARTIN S. KAUFMAN, Bower & Gardner, New York, N.Y., for Defendant-Appellee Ebasco Services.

CARDAMONE, Circuit Judge:

Having won a small victory in the district court, plaintiff's lawyer decided to take this appeal from the denial of counsel fees and the amount of prejudgment interest awarded. In this endeavor he has

heedlessly submitted a mishmash of letters, instruments, pleadings, affidavits, and documents--many irrelevant and some improper--most of which are inappropriate for a lawyer considering his client's best interests. Plainly, not all adverse rulings in the district court warrant an appeal and, more pointedly, as our holding in this case makes clear, a lawyer should look carefully before jumping to the conclusion that his interests are also his client's.

BACKGROUND

This appeal is from the denial of counsel fees and the partial denial of prejudgment interest awarded plaintiff Amina Soliman in her Title VII employment discrimination action. Plaintiff instituted this action under the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. (1982), after her employment with Ebasco

Services Incorporated was terminated on November 30, 1979. Before bringing suit Ms. Soliman had filed charges with the Equal Employment Opportunity Commission (EEOC) and had sought an injunction requiring Ebasco to reinstate her. Because she moved in 1980 from New Orleans, Louisiana--where she had been employed by Ebasco--to Denver, Colorado the injunction was denied. Later, plaintiff moved to New Jersey and while there obtained a "Right to Sue Letter" on February 7, 1985. In April 1985, five and half years after her employment had been terminated, plaintiff filed her complaint in the United States District Court for the Southern District of New York (Griesa, J.).

The action was tried before a jury and resulted in a December 12, 1986 verdict for Ms. Soliman in the amount of $5400. During the trial she claimed that she had been

denied equal employment opportunities by her employer on account of her sex, and that she had been subjected to a retaliatory discharge because of the complaints she had filed with the EEOC. Four questions were submitted on liability. These were whether Ms. Soliman was discriminated against because she was (1) promoted only on a probationary basis (2), demoted in September 1979, (3) laid off in November 1979, and (4) discharged in November 1979 in retaliation for commencing the EEOC proceedings. The first three were answered in the negative by the jury; the fourth on retaliation charge was answered in the affirmative. It was on the basis of that answer that the jury awarded plaintiff the damages referred to. No appeal was taken form this award.

Immediately after the jury was excused on December 12, plaintiff's attorney moved

for counsel fees pursuant to 42 U.S.C. 2000e-5(k). In that application, styled "Application For Counsel Fees By Attorney For Plaintiff," general statements were set forth that the attorney attended "conferences with client," made "long distance phone calls," conducted "discovery," and performed "research." Seventy five hours of billable time were claimed at a $200 per hour rate, amounting to $15,000 plus itemized disbursements of $98.55. The application concluded with a request that the trial court award $15,098.55 to the "undersigned" attorney for plaintiff. Judge Griesa promptly denied the motion "with leave to renew" upon a proper factual showing.

The following day a "Chart" of hours expended was submitted by plaintiff's attorney again claiming the same amount for

counsel fees. Opposite the month, day, and year, each one-line statement of the 20 or so items recites services, such as, "research," "conference," "review of papers," "preparation for trial." The billable hours for these services are all expressed in whole numbers. At the same time a proposed judgment was submitted to the trial court which provided that "attorney for plaintiff shall recover attorney's fees in the sum of _____." In addition, prejudgment interest on the award was sought commencing on November 19, 1979.

After first striking the language awarding attorney's fees and adding $527 in prejudgment interest, Judge Griesa signed a judgment awarding plaintiff $5927 on February 3, 1987 and, at the same time, handed down a written decision setting forth the computation of prejudgment interest.

The district court's rationale was that Ms. Soliman had a right to sue immediately after the termination of her EEOC proceeding on October 21, 1981, and "for no good reason" delayed bringing suit until April 1985. Thus, the district court awarded prejudgment interest only for the period of time commencing when Ebasco had a general layoff on May 1, 1980 until October 21, 1981, when plaintiff could have initiated her suit.

The district court rejected the request for an award of attorney's fees stating that there was no justification for an amount nearly three times the recovery found for plaintiff by the jury. It considered plaintiff's success minimal and the award small. On most issues, the district court continued, Ms. Soliman did not prevail, and on the one issue where she did, the trial judge commented--"[I]t is fair to say that

certain questions asked. . .by the court, in attempting to clarify a confusing record, elicited the evidence which formed the necessary basis for the narrow verdict in plaintiff's favor." It further stated that the presentation of this case was "confusing and lacking in qualities ordinarily associated with the orderly presentation of a meritorious case."

On February 11 a notice of appeal from the denial of counsel fees and the computation of prejudgment interest was filed by the attorney for plaintiff. Five days later, on February 16, Ms. Soliman wrote in longhand to Judge Griesa saying that her attorney had appealed "totally [sic] in [sic] his own" without her permission, that she was "not interested in the appeal [sic]," and that she accepted the district court's judgment. She also asked

for a copy of Judge Griesa's order. By Memorandum of February 19 directed to plaintiff and both counsel that recited Ms. Soliman's statement that the appeal was unauthorized, Judge Griesa noted that in light of the filing of an appeal he was without further jurisdiction, and referred any questions plaintiff might have to the Clerk of this Court.

On March 27, a brief raising the issues of counsel fees and prejudgment interest together with an appendix were filed in the Clerk's office on plaintiff's behalf. On May 13, appellee's brief was filed which, among other arguments, questioned plaintiff's attorney's standing to argue the district court's denial of attorney's fees in light of plaintiff's letter of February 16 to Judge Griesa. The appeal was argued May 21. The standing issue was the subject

of questions to plaintiff's counsel, who responded by handing up to the Court a handwritten letter from Ms. Soliman dated May 13 (the date when appellee's brief was filed), a satisfaction of the $5927 judgment, and an undated assignment of that judgment to the lawyer. Each of these instruments were signed by plaintiff.

DISCUSSION

A.

A thread can be discerned that runs consistently throughout this record. Right from the date of the verdict on December 12, 1986, plaintiff's attorney evinced his obvious belief that the claim for counsel fees rightfully belonged to him. In this he was thoroughly mistaken. The statute plainly provides that the court "in its discretion may allow the prevailing party. .

a reasonable attorney's fee as part of the costs." 42 U.S.C. 2000e-5(k). The Supreme Court has held that the words "prevailing party" found in 1988 of the Civil Rights Act refer to plaintiff's entitlement to those fees, not the plaintiff's lawyer. See Evan v. Jeff D., 106 S. Ct. 1531, 1538-40 & n.19 (1986). We see no reason not to apply this interpretation to 42 U.S.C. 2000e-(k). See Moore v. National Ass'n of Securities Dealer, Inc., 762 F.2d 1093, 1099 n.10 (D.C. Cir. 1985). ("The goal of the [Title VII provision for attorney's fees] is to encourage plaintiffs to bring meritorious suits to providing them a source of funds for retaining competent counsel.") (emphasis in original). Whether those attorney's fees that are awarded ultimately end up in the lawyer's or the client's hands depends, of course, on the private fee

arrangements entered into between them when representation is undertaken. See Oguachuba v. I.N.S., 706 F.2d 93, 97 (2d Cir. 1983).

Thus, independent of his client, an attorney has no personal right to an award of statutory attorney's fees under 42 U.S.C. 2000e-5(k). Of course, an attorney also lacks standing to appeal an award of prejudgment interest without his client's authorization. We find no authorization of this appeal by Ms. Soliman. The record contains only Ms. Soliman's statement that the notice of appeal filed by her attorney was unauthorized. Since the prevailing party has not authorized the appeal, and her attorney lacks standing to prosecute it in his own name, it must be dismissed.

B.

Appellee has requested that sanctions be imposed upon counsel for appellant under

Fed. R. App. P.38. This Rule empowers an appellate court, upon determining that an appeal is frivolous, to "award just damages and single or double costs to the appellee." When an appeal is brought without the client's authorization and, in fact, as here, over the client's express statement that the appeal was without her permission, there can be no question that sanctions are appropriate. In this case, the conduct of plaintiff's attorney was particularly egregious since it seems clear that he was acting for his own monetary benefit in bringing this appeal because, by his own admission, he chose not to raise alleged errors in the proceedings below, some of which might have accrued to his client's benefit.

We also note that the attorney's conduct throughout the course of this appeal was

ill-advised, if not improper. After being informed by Judge Griesa that the notice of appeal he had filed was unathorized, the attorney nonetheless proceeded to file a brief and appendix in this Court. These actions strongly suggest a misapprehension by plaintiff's attorney of his responsibilities. An attorney's only ethical obligation is to serve his client loyally and competently, without allowing his own financial interests to influence his actions. Hence a client's decision not to pursue an appeal is one a lawyer must abide by because such a decision is exclusively that of the client. See Model Code Of Professional Responsibility, EC7-7, EC7-8, EC7-9 (as amended, 1980).

Further, Judge Griesa had stated in his written opinion that the merits of the case were "slim" and lacked the qualities

ordinarily associated with a meritorious case. Yet, despite recovering only $5400, the attorney then sought $15,000 in fees without furnishing the district court with contemporaneous time records, which for many years have in this Circuit been a prerequisite to obtaining any court-ordered attorney's fees. Lewis v. Coughlin, 801 F.2d 570, 577 (2d Cir. 1986); New York Ass'n for Retarded Children v. Carey, 711 F.2d 1136, 1148 (2d Cir. 1983); McCann v. Coughlin, 698 F.2d 112, 131 (2d Cir. 1983).

In addition, plaintiff's attorney has attempted to file numerous and mostly irrelevant papers since oral argument. Although these papers are not received on the merits, it was necessary to examine them and they were considered on the question of whether to impose sanctions. Among them is a holographic letter from Ms. Soliman to her

attorney, plainly stating that she wanted his actions to be at "no cost" to her. The possibility of sanctions for pursuing a frivolous appeal would, of course, be at considerable cost to plaintiff and contrary to her express wish.

Also among the documents handed to the panel during oral argument was, as noted, an assignment by Ms. Soliman to her attorney of her $5927 judgment. While the exact terms of this assignment cannot be ascertained, we are concerned that this contract might violate the ethical canon that after undertaking a retainer an attorney should take care not to acquire a property right that would tend to make his professional judgment less protective of his client's interests. See Model Code of Professional Responsibility, EC5-2.

Realizing at oral argument the panel's concern regarding his status as appellant,

plaintiff's attorney subsequently obtained and forwarded an affidavit from his client stating that she had authorized the appeal. Although in the past we have exercised our discretion and reluctantly received such a document, see Brown v. General Motors Corp., 722 F.2d 1009 (2d Cir. 1983), under the present circumstances we decline to do so at such a late date. Finally, in his most recent letter dated June 5, 1987, the attorney refers to settlement offers made by opposing counsel at the pre-argument Civil Appeals Management Plan Conference. Such a reference "is a serious breach of the confidentiality essential to the purposes of pre-argument conferences" that is "highly improper and will not be condoned." Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 929-30 (2d Cir. 1979), cert. denied, 444 U.S. 1076 (1980).

CONCLUSION

For the reasons stated above this appeal is dismissed. Because it was brought by a lawyer without standing, we consider it frivolous. Damages are accordingly awarded in the amount of $1000 plus the costs of the appeal, payable to appellee by plaintiff's attorney. No sanctions are imposed against Ms. Soliman. The case is referred to Chief Judge Charles L. Brieant of the District Court for the Southern District of New York with the request that he refer this case to the Southern District Committee on Grievances for whatever further action it may deem advisable.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - - - - - - - - - - - - -X

AMINA SOLIMAN,

Plaintiff-Appellant,

-against-

EBASCO SERVICES, INC.

Defendant-Appellee

87-7146

Docket No.

NOTICE OF MOTION for: summary of dismissal of appeal

- - - - - - - - - - - - - - - - -X

MOTION BY: (Name, address and tel. no. of attorney in charge of case)

Bower & Gardner
Attorneys for Defendant-Appellee
110 East 59th Street
New York, New York 10022
(212) 751-2900 Martin S. Kaufman, Of Counsel

Has consent of opposing counsel:

A. been sought? __Yes X No

B. been obtained? X Yes X No

Has service been X Yes ___No
effected?

Is oral argument desired? __Yes X No
(Substantive motions
only)

Requested return date:

(See Second Circuit Rule 27(b)

Has argument date of appeal been set:

A. by scheduling X Yes ___No
order?

B. by firm date of __Yes X No
argument notice?

C. If Yes, enter date: May 4, 1987

Judge or agency whose order is being appealed:

U.S. District Judge Thomas P. Griesa

Brief statement of the relief requested:

Dismiss the appeal or, in the alternative, allow defendant-appellee additional time to serve and file its brief.

Complete Page 2 of This Form

By: (Signature of attorney)

/S/

Signed name must be printed beneath

Martin S. Kaufman

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is on or before May 11, 1987.

Appearing for: (Name of part) Appellant or Petitioner:

X Plaintiff

_ Defendant

Appellee or Respondent:

Ebasco Services, Inc. _ Plaintiff

X Defendant

Date

7/23/1987

denied; brief may be filed

FOR THE COURT

/S/

by Naomi J. Tate, Deputy Clerk

May 21, 1987

Ms. Amina Soliman

2 Galston Drive

Robbinsville, New Jersey

Honorable Judge Lumbard

U.S. Court of Appeals

2nd Circuit

Foley Square, New York 10007

Your Honor:

Confirming my telephone call to Chambers, I have fully authorized this appeal as submitted by my attorney Omar Z. Ghobashy on Counsel Fees and pre-judgement interest. This includes denial of punitive damages.

Sincerely,

/S/

Amina Soliman

UNITED STATES COURT OF
APPEALS SECOND CIRCUIT

- - - - - - - - - - - - - -X

AMINA SOLIMAN,

Plaintiff-Appellant, Affidavit

- against - Docket #87-7146

EBASCO, INC.,

Defendant-Appellee.

- - - - - - - - - - - - - -X

STATE OF NEW JERSEY)
COUNTY OF)

Amina Soliman, being duly sworn, deposes and says the following:

1. I am the appellant herein.

2. I have fully authorized my attorney, Omar Z. Ghobashy, Esq., to file the appeal that he has filed in this action.

3. I have previously signed an affidavit to that effect but was lost because I have moved to a new address.

4. I specifically authorized Mr. Omar Z. Ghobashy to pursue the appeal on the denial of counsel fees and pre-judgement interest.

Sworn to before me this
21st day of May, 1987

/S/

/ S /

Amina Soliman

Mr. Omar Z. Ghobashy

Attorney at Law

122 East 42nd Street, Ste. 1117

New York, N.Y. 10168

May 13th, 1987

Dear Mr. Ghobashy:

Enclosed are all the papers that you requested.

My new address is:

2 Galston Drive

Robbinsville, N.J. 08691

I am going to take you on your offer for appealing for the interest money with no cost to me.

I also want to offer you something which is 10% of the interest money if you do the following:

1. You keep me informed with all correspondence.
2. If you succeed to collect the interest for the period between 1979 - 1987, As per our phone conversation.

Sincerely yours,

/S/

A. Soliman

KNOW ALL MEN BY THESE PRESENTS,

THAT

AMINA SOLIMAN

for value received, has sold and by these presents does grant, assign and convey unto

TO HAVE AND TO HOLD the same unto the said Omar Z. Ghobashy, Esq.

executors, administrators and assigns forever, to and for the use of:

Judgement of U.S. District Court, Southern District of New York entered February 6, 1987, No. 87, 0255, in an action entitled Amina Soliman, Plaintiff, against Ebasco Services Incorporated, defendant 85 Civ. 3201, in the sum of $5927.00.

hereby constituting and appointing OMAR Z. GHOBASHY, Esq.,

true and lawful attorney irrevocable in her name, place and stead, for the purposes aforesaid, to ask, demand, sue for, attach, levy, recover and receive all such sum and sums of money which now are, or may hereafter become due, owing and payable for, or on account of all or any of the accounts, dues, debts, and demands above assigned

giving and granting unto the said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary, as fully, to all intents and purposes, as he might or could do, if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that the said

attorney or his substitute shall lawfully do, or cause to be done by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the 13th day of May one thousand nine hundred and Eighty Seven.

/S/

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF Cynthia S. VanHise
5/13/87

/S/

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - -XIndex No.

AMINA SOLIMAN 85 Civ.3201

Plaintiff (T.G.)

-against- SATISFACTION

EBASCO SERVICES, INC. JUDGEMENT

Defendant

- - - - - - - - - - - - - - - - -X

WHEREAS, a judgement was entered in the above entitled action on 2/3/1987 in the U.S. District Court of Southern District of New York in judgement book page No. in favor of Amina Soliman

and against Ebasco Services Incorporated

for the sum of $5927.00 which judgement was docketed on 1987 in the office of the Clerk of the County of Southern District in

judgement book page 1987.

No. (870255)

and said judgment has been paid and the sum $ none remains unpaid

AND it certified that there are no outstanding executions with any Sheriff or Marshal within the State of New York,

THEREFORE, satisfaction of said judgment is hereby acknowledged, and the said Clerks are hereby authorized and directed to make an entry of satisfaction on the docket of said judgment.

Dated:

25 March, 1987 /S/

Amina Soliman

STATE OF N.J.)

ss:

COUNTY OF MIDDLESEX)

On the 13th day of May 1987, before me personally came

to me known and known to me to be the in the above entitled action, and to be the same person described in and who executed the within satisfaction of judgment and acknowledged to me that he executed the same.

/S/

Microfilm

Dec. 16, 1986 - 12:00 PM

Microfilm

Motion denied with leave. Make a similar motion with a proper factual presentation.

Thomas P. Griesa

12/12/86

Seal of Approval

United States District Court

Feb. 5, 1987

UNITED STATES DISTRICT

COURT SOUTHERN DISTRICT

OF NEW YORK

- - - - - - - - - - - - - - - - -X

AMINA A. SOLIMAN,

Plaintiff 85 Civ 3201 (Judge

-against- Griesa)

EBASCO SERVICES INCORPORATED,

Defendant

- - - - - - - - - - - - - - - - -X

APPLICATION FOR COUNSEL FEES

BY ATTORNEY FOR PLAINTIFF

Omar Z. Ghobashy, Esq., attorney for plaintiff, moves the Court for an award of counsel fees pursuant to the provision of Title 42 U.S.C. 2000e 5 (k), which reads as follows: "In any action or proceeding under this title (2000e-2000e-15 of this title) the Court, in its discretion may allow the

prevailing party, other than the Commission or the United States a reasonable attorney's fee as part of the costs,. . ."

While EEOC in New Orleans had found probable cause and commenced a preliminary injunction action in the Eastern District in Louisiana, they gave the plaintiff the letter of the right to sue, and thus she was to retain counsel and bring this private action.

The undersigned attorney brought this action in the Southern District of New York, and handled all proceeding for a period of almost 2 years, attending conferences with client, long distance communications with EEOC, attorneys in Louisiana, and extensive discovery, motion, Requests for Interrogatories, production of documents, research, court conferences, negotiations with attorneys for defendant,

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

AMINA A. SOLIMAN,

Plaintiff, 85 Civ. 3201

v. OPINION

EBASCO SERVICES INC.,

Defendant.

- - - - - - - - - - - - - - - - - X

GRIESA, J.

This action was tried by a jury, which returned its verdict on December 12, 1986. Plaintiff claimed that defendant discriminated against her on the ground of her female sex, and also claimed that defendant retailiated against her because of complaints she had filed with the EEOC. These alleged improper actions were said to have resulted in her demotion, and then ultimately in her termination. Four

questions were submitted to the jury on liability and a fifth question on damages. The first question was whether plaintiff's sex was a significant motivating factor in her demotion in September 1979. The second question asked whether plaintiff's sex was such a factor in her termination in November 1979. The third and fourth questions asked whether plaintiff's complaints before the EEOC were significant motivating factors in her demotion and in her termination. The fifth question asked what amount of damages, if any, should be awarded.

The jury gave negative answers to Questions 1-3, and an affirmative answer to question 4. The jury then awarded damages in the amount of $5,400.

The success of plaintiff was small indeed in comparison with the broad claims

and the large amount of damages contended for at the trial.

In submitting the proposed judgment, plaintiff has requested, in addition to the jury award of $5,400, pre-judgment interest in the amount of $5,992, and an attorney's fee in the amount of $15,098.

The award of pre-judgment interest in a federal sex discrimination action is discretionary. Taylor v. Philips Industries, 593 F.2d 783, 787 (7th Cir. 1979). It is my view that such interest should be awarded, although not in the amount requested by plaintiff.

It is quite obvious that the jury accepted defendant's contention that any damages awarded could not cover any period after April 1980, which was the time of a general layoff. For purposes of the interest award, it will be considered that the

interest starts to run on May 1, 1980. Defendant now contends that the running of the interest should terminate as of October 21, 1981, when the EEOC proceeding was dismissed. Defendant argues that plaintiff had a right to sue immediately after the termination of the EEOC proceeding, but for no good reason delayed doing so until April 1985. The court agrees with defendant and rules that interest is cut off as of October 21, 1981.

Under state law, which is applicable here, the rate to be awarded would be% until June 25, 1981, and 9% thereafter. This means that $371 interest is awarded for the period May 1, 1980 to June 25, 1981, and $156 is awarded for the balance of the period to October 21, 1981. The total interest award is $527.

The award of an attorney's fee in a sex discrimination case is also discretionary. 42 U.S.C. §2000e-5(k); Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1982). A prevailing plaintiff ordinarily should recover such fee "unless special circumstances would render such an award unjust." Id. at 429. The Hensley opinion lists a number of factors to be considered. Id. at 430 n.3. The court has considered the various factors, and decides that no attorney's fee should be awarded in the present case. The degree of success was minimal and the award was small. On most issues of the case, plaintiff did not succeed. On the one narrow point on which plaintiff prevailed, it is fair to say that certain questions asked of plaintiff's superior by the court, in attempting to clarify a confusing record, elicited the

evidence which formed the necessary basis for the narrow verdict in plaintiff's favor.

Certainly, there is no jurisdiction whatever for an award, as requested by plaintiff, of approximately three times the recover granted by the jury. It is possible that some amount much smaller could be awarded. However, in the court's judgment, this is a case where the merits of the claim presented in court were unusually slim, and the presentation in court by both plaintiff and her attorney was to a large extent confusing and lacking in qualities ordinarily associated with the orderly presentation of a meritorious case. For these reasons, the application for attorney's fees is denied in its entirety.

SO ORDERED

Dated: New York, New York
February 3, 1987

THOMAS P. GRIESA

U.S.D.J.

UNITED STATES DISTRICT

COURT SOUTHERN DISTRICT

OF NEW YORK

- - - - - - - - - - - - - - -x Index #:85 Civ.

AMINA A. SOLIMAN 3201(TPG)

Plaintiff-Appellant

v. NOTICE OF APPEAL

EBASCO SERVICES INCORPORATED,

Defendant-Appellee

- - - - - - - - - - - - - - -x

PLEASE TAKE NOTICE, that the above named Plaintiff

hereby appeal(s) to U.S. Court of Appeals, Second Circuit

From the Order and Judgement of the U.S. District Court, Southern District of N.Y. Court in this action, entered in the office of the Clerk of said Court on

February 3 and February 5, 1987,

on the 3rd day of February 19, 87, an Order and February 5, 1987, Judgement,

Only from denial of counsel fees, and of the dates of pre-judgement interest, which should be from date of discharge, 11/30/1979 to date of judgement.

and from each and every part thereof.

Dated:

February 11, 1987

Yours etc., /s/

OMAR Z. GHOBASHY

Attorney(s) for

Plaintiff and

Appellant

To Bower and Gardner, Esqs.

110 E. 59th Street

New York, N.Y. 10022

Attorney(s) for Defendant and Respondent;

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

AMINA SOLIMAN,

Plaintiff

-against- JUDGEMENT

EBASCO SERVICE INCORPORATED, 85 Civ.3201

Defendant (TPG)

- - - - - - - - - - - - - - - - - X #87,0255

This action came on for trial before the Court, Honorable Thomas P. Griesa, U.S. District Judge, presiding, and the Court having instructed the Jury to make answer to certain interrogatories, and the Jury having made answer to said interrogatories,

And now, in accordance with the special verdict of the Jury, and the opinion of the Court, it is hereby,

ORDERED, ADJUDGED, AND DECREED that

the Plaintiff, Amina Soliman, recover of the defendant, Ebasco Services, Incorporated, the sum of $5400.00, with interest in the sum of $527 making a total sum of $5927.

Dated: N.Y., N.Y.

Feb. 3, 1987

Thomas P. Griesa

U.S.D.J.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the third day of September one thousand nine hundred and eighty-seven.

AMINA A. SOLIMAN,

Plaintiff-Appellant, No. 87-7146

v.

EBASCO SERVICES INCORPORATED,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-

appellant Amina A. Soliman,

Upon consideration by the panel that heard the appeal, it is ORDERED that said petition for rehearsing is DENIED.

It is further noted that the suggestion for rehearsing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be thereon.

/ S /

Elaine B. Goldsmith

Clerk

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Invitation to Participate in Settlement Discussions

Section 706(b) of Title VII, Civil Rights Act of 1964, as amended, requires that when the Commission determines there is a reasonable cause to believe the charge is true, it shall endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliations, and persuasion. This invitation is being issued to both parties to determine their willingness to engage in such settlement discussions. If either party declines discussion, or the Commission is unable to secure an acceptable settlement, the District Director shall inform both parties, in writing, of alternatives for obtaining relief available

to the Charging Party(ies) and the Commission.

Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written conset of the persons concerned.

Date

Charge Number
062-79-1067 &
062-79-1991

Please complete the following information and return to EEOC in attached self-addresses envelope

To:	From:
Equal Employment	Amina Soliman
Opportunity	1085 East Batos Parkway
Commission	Englewood, CO 80110
New Orleans St.	
600 South Street	
New Orleans, LA 70130	

Will	Will not engage in settlement discussions

Date	Time
Jan. 24th or 26th	10:00 a.m.
1983	

Location

EEOC or my office

Comments

Date

Telephone number where signee can be reached

Typed name of charging party/ respondent

Signature

Charging Party's Copy

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

New Orleans District Office

F. Edward Hebert Federal Building

600 South Street, Room 528

New Orleans, Louisiana 70130

CERTIFIED MAIL NO._____

Charge Nos. 062-79-1067 & 062-79-1991

Amina Soliman

1085 East Bates Parkway

Englewood, Colorado 80110

Charging Party

and

Ebasco Services Incorporated
P.O. Box 70

Killona, LA 70066

Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue, on behalf of the Commission, the following determination as to the merits of the subject charge.

All jurisdictional requirements have been met.

The Charging Party alleged that Respondent discrimination against her by failing to promote her to the designer position,

because of her sex, by demoting her and terminating her in retaliation for her having filed a charge of discrimination. Examination of the evidence shows the following facts which indicate that there is reasonable cause to believe that the allegations failure to promote, demotion, retaliation and discharge are true:

Charging Party holds a degree in Architectural Structure; she also took and passed 2 structural engineering design courses and had 4 years experience as Structural Design Engineer.

Charging Party made known to Respondent prior to 2/5/79 her interest in being considered for promotion to the position of Designer.

On 2/5/79 Respondent promoted a male who holds a diploma in Engineering from a Railway Institute's "Civil group" and whose experience includes the position of Drafter.

The Commission has determined thru an expert witness that Charging Party's qualifications were undisputed.

On 6/1/79 Charging Party was promoted to Designer on a probationary basis, because Respondent considerate her training in mathematical calculations inadequate for the job.

On 9/14/79 Charging Party was demoted to Senior Draftsperson due to alleged "satisfactory performance. Upon examination of the errors allegedly

committed by Charging Party, the expert witness determined that they were not as severe as alleged. The record is silent as to performance beyond that testified to by the expert witness.

On 11/30/79 Charging Party was terminated due to alleged reduction in force. The evidence shows that there were other Senior Draftspersons with less work time than Changing Party who were not terminated. Charging Party was the only employee selected for termination by Respondent in its entire work site. The Commission has, therefore, determined that the reason Charging Party was selected for termination was pretextual.

Accordingly, it is concluded that there is reason to believe that Respondent improperly considered Charging Party's sex when it made the decision not to promote her, and that it demoted and discharged her in retailiation for her having filed charges of discrimination.

Having determined that there is reasonable cause to believe that the charges are true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of the matter. The parties may indicate their willingness to enter into settlement discussion by completing the enclosed invitation and returning it to the office in the self-addressed envelope within ten (10) days of the receipt of this letter.

Equal Employment Opportunity Commission

New Orleans District Office

F. Edward Herbert Federal Building

600 South Street, Room 528

New Orleans, Louisiana 70130

CM NO. P 455 706 285

January 24, 1983

Harry A. Rosenberg, Esq.

Phelps, Dunbar, Marks, Claverie

& Sims

Hibernia Bank Building

New Orleans, LA 70112

Re: Soliman v. Ebasco - 062-79-1067

062-79-1991

Dear Mr. Rosenberg:

This will acknowledge receipt of your letter dated January 13, 1983, wherein you request reconsideration of a cause determination issued in the above captioned case by this Agency on December 20, 1982.

The case file has been reviewed along with the contents of your letter. It is from this review that the original determination will be allowed to stand as issued.

You have ten (10) days to indicate your willingness to enter into settlement discussion, upon receipt of this letter.

On behalf of the Commission:

Patricia T. Fields

District Director

cc:

Richard A. Thompson Esq.

310 Richards Building

New Orleans, LA 70112

On behalf of the Commission:

_____

Date

_____

Charles A. Haycraft

Acting District Director

Enclosures: (3)

Invitation to Participation in Settlement Discussions

Notice of Conciliation Process

Self-Addressed Envelope

cc:

Harry A. Rosenberg, Esq.

Richard Thompson, Esq.

CERTIFIED MAIL # P181 917 051

Equal Employment Opportunity Commission

NOTICE OF RIGHT TO SUE

(Issued on Request)

To: Amina A. Soliman
204 Applegate Lane
E. Brunswick, NJ 08816

From:
Equal Employment Opportunity Commission
New Orleans Distric Office
600 South Maestri Place, Rm 535
New Orleans, Louisiana 70130

On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F. R. 1601.7(a)).

Charge Number
062 79 1991

EEOC Representative
Donald R. Stacy, Regional Attorney

Telephone Number

(504) 589-3844

(See Section 706 (f)(1) and (f)(3) of the Civil Rights Act of 1964 and the other information on the reverse side of this form.)

TO THE PERSON AGGRIEVED:

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

___ More than 180 days have expired since the filing of this charge.

____ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

____ With the issuance of this Notice of Right to Sue, the Commission is terminating any further processing of this charge.

____ It has been determined that the Commission will continue to process your charge.

____ ADEA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you obtained the right to

sue under the Age Discrimination in Employment Act (ADEA) when you filed your charge, subject to a 60-day waiting period. ADEA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged discrimination.

____ EPA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you already have the right to sue under the Equal Pay Act (EPA) (you are not required to complain to any administrative agency before bringing an EPA suit in court). EPA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged EPA underpayment.

Equal Employment Opportunity Commission

New Orleans District Office

F. Edward Herbert Federal Building

600 South Street, Room 528

New Orleans, Louisiana 70130

Certified Mail No. P 455 706 152

Charge No.:062-79-1991 &

062-79-1067

Respondent:Ebasco, Inc.

Anna A. Soliman

415 Monsanto Drive

Luling, LA 70070

Dear Ms. Soliman:

Your case has been referred to the Commission's Acting Regional Attorney for

review to determine whether the Commission will bring a civil action in Federal District Court based on your charge. An initial determination should be forthcoming within 30 days.

If the Commission decides to bring a civil action, you have the right to intervene in such an action. If the Commission decides that it will not bring a civil action based on your charge, you will notified and receive a Notice of Right to Sue, which will entitle you to sue the respondent on your own behalf.

Sincerely,

/S/

Date Patricia T. Fields

District Director

cc:

Richard A. Thompson, Attorney

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

cc: (to respondent)
Harry A. Rosenberg, Esq.

On Behalf of the Commission

__ Copy of Charge

/S/ 2/7/85

Patricia T. Fields
District Director

Date

BOWER & GARDNER

Attorney At Law

110 East 59th Street

New York, NY 10022

(212) 751-2900

Telecopire 752-3148

Telex 881608

May 29, 1987

Hon. Thomas J. Meskill

United States Circuit Judge

United States Court of Appeals

for the Second Circuit

40 Centre Street

New York, New York 10007

Hon. Richard J. Cardamore
United States Circuit Judge
United States Court of Appeals
for the Second Circuit
40 Centre Street
New York, New York 10007

Hon. J. Edward Lumbard
United States Circuit Judge
United States Court of Appeals
for the Second Circuit
40 Centre Street
New York, New York 10007

Re: Soliman v. Ebasco Serv. Inc.
Docket No. 87-7146

Honorable Sirs:

I write this letter with great reluctance, because I do not believe that post-argument, extra-judicial communication is appropriate. However, in view of the fact that appellant and her attorney have embarked upon such a course, I believe it necessary to communicate my views of recent events to the Court.

First, I would observe that the extra-judicial telephone call to Judge Lumbard's Chambers by Mrs. Soliman on or about May 21, 1987, the day of the oral argument in teh captioned appeal, is highly irregular. The subsequent in the captioned appeal, is highly irregular. The subsequent submission of an affidavit purportedly sworn to May 21, 1987 in which Mrs. Soliman states

that she authorized pursuit of the appeal is likewise highly irregular. Moreover, the letter and the affidavit are inconsistent in that Mrs. Soliman's letter states that she authorized the appeal by her attorney, and that the authorization "includes denial of punitive damages." The affidavit says nothing about punitive damages, and indeed the appeal which was taken is not an appeal from denial of punitive damages at all. It therefore appears that Mrs. Soliman may not be fully informed as to the nature and subject of the appeal.

In addition, Your Honors will recall that at the oral argument Mr. Ghobashy handed up to the Court three documents (with which I had not been served), consisting of a holographic letter from Mrs. Soliman, a

satisfaction of judgment dated March 25, 1987 and notarized on May 13, 1987, and an assignment of her interest in the judgment entered February 6, 1987 of the United States District Court for the Southern District of New York in the action below, which assignment appears to have been notarized on May 13, 1987. The existence of this assignment raises the question whether Mrs. Soliman is still the real party in interest in this case. I believe in response to a question from Judge Meskill, Mr. Ghobashy stated that the consideration paid for the assignment was the amount of the judgment, the sum of $5,927.00. It would appear, therefore, that any additional monies which may be granted on this appeal or on remand (in the remote event that appellant prevails) will be a windfall to

Ghobashy and of no benefit to Mrs. Soliman.

I also respectfully bring to the attention of the Court that Ebasco Services, Inc., the appellee herin, has asked for an award of damages and double costs as sanctions for the prosecution of a frivolous appeal. At page 31 of the Brief of Defendant-Appellee, we stated that, "In view of Mrs. Soliman's desire not to have the appeal taken, we believe it would be unjust to levy an penalty against her." If the net result of the confusing and somewhat contradictory cncatenation of documents submitted by Mr. Ghobashy during and after oral argument amounts to consent by Mrs. Soliman to prosecution of the appeal in her name and in her behalf, then we would respectfully request that the Court deem our application

for sanctions to be standing a possible consent by Mrs. Soliman to pursuit of the appeal, the appeal is so substantively lacking in merit for the reasons set forth in Points II and III of Defendant-Appellee's Brief that sanctions are appropriate and warranted under the authorities cited in Point IV of our Brief.

Respectfully yours,

Martin S. Kaufman

MSK:djl

cc: Omar Z. Ghobashy, Esq.

BOWER & GARDNER
Attorneys At Law
110 East 59th Street . New York, NY 10022
(212) 751-2900

Telecopier 752-3184

Telex 881608

March 5, 1987

Omar Z. Ghobashy, Esq.

122 East 42nd Street

Suite 1117

New York, New York 10168

Re: Soliman v. Ebasco

85 Civ. 3201 (TPG)

Dear Mr. Ghobashy:

This is to confirm our telephone conversation of yesterday, in which I advised you that I had received a memorandum from Judge Griesa, dated February 27, 1987 (copy enclosed), in which Judge Griesa

advised that his office had received a telephone call from Mrs. Soliman requesting that the amount to be paid under the judgment should be remitted to Mrs. Soliman, and not to you.

I had previsouly received a letter from you, together with a copy of the judgment, requesting that a check in payment of the judgment, in the amount of $5,927.00, be made payable to Mrs. Soliman and yourself, as attorney, and be sent to you.

The conflicting requests from you and your client put me and this firm's client in a difficult quandary. I have suggested to you that I obtain from my client in the appropriate amount made payable to plaintiff, which I would hold pending receipt of joint instructions from you

and Mrs. Soliman. I further suggested that I would exchange the check for an executed Satisfaction of Judgment in proper form to be filed. I still believe that this is an appropriate mechanism.

I have an alternative suggestion, which is for me to instruct my client to make a check payable to this firm in the amount of the Judgment, which we will then deposit. I have today made such a request of my client. This firm will then draw a check in favor of Mrs. Soliman alone or Mrs. Soliman and you, depending upon the instructions I receive from you and Mrs. Soliman, jointly. Upon receipt of such instructions, I would convey the check to the appropriate person

with a simultaneous delivery to me of a Satisfaction of Judgment.

Very truly yours,

/ S /

Martin S. Kaufman

MSK:djl

cc: Hon. Thomas P. Griesa

OMAR Z. GHOBASHY

Attorney At Law

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New York, N.Y. 10168

(212) 557-3720

June 2, 1987

Hon. J. Eward Leonard

Hon. Richard J. Cardamore

Hon. Thomas J. Meskill

Circuit Judges

U.S. Court of Appeals

2nd Circuit

Foley Square

N.Y. N.Y. 10007

Re: Soliman V. Ebasco Services Inc.

87-7146

Your Honors:

This attorney who practiced before this court for 30 years is probably known to the Senior Judges when he appeared as attorney of American Indian Tribes.

The letter of attorney for appellee is surprising in that he wants to utilize my client-attorney relation as a way to argue his case, ignoring the real issues.

He is complaining about my client's telephoning chambers, confirming her support of the appeal, but he is using her communication to U.S. District Judge to defeat the appeal and make a motion to that effect which was denied, yet he makes another motion to add her letter to the

Judge to impose on the Court a matter not part of the record and not on appeal. I was questioned on this issue by the panel. The papers were added to his Brief prior to decision on Motion and his motion was granted without awaiting the service and filing of my answering papers before the return date. Certainly the Court had asked and accepted the assignment of Judgement, satisfaction of Judgement and my client's letter.

To be noted that satisfaction of Judgment was obtained at request of Mr. Kaufman who refused to pay the Judgement until I submit to him satisfaction of Judgement and also authorization from my client or from me as to whom the Judgement should be paid.

Now he tells the Court that is not the way he practices. He did not want to accept satisfaction of Judgment because it will render appeal moot. How that can be, when the appeal is taken from post judgment order and is limited to counsel fees and pre-judgment interest.

He told Mr. Baas at conference that he will pay the Judgement to my client and her attorney. Now, he refuses to pay it to me after Judgement is assigned to me.

If the communication of my client to chambers to confirm her consent to the appeal is highly irregular, why her contact with Trial Judge is not highly irregular?

Of course, the pre-judgment interest is closely to denial or not deciding punitive damages. That issue of punitive damages was raised at conference.

The documents delivered to Court were delivered personally to Mr. Kaufman by my investigator, Mr. Glenn, but he told the Court that he refused to accept them. They were mailed to him certified mail.

The incredible actions of Ebasco lawyers in concealing an important document from a U.S. agency, E.O.C., and from us, and in refusing discovery, and in offering testimony of general layoff in 1980 that was found by EEOC to be untrue, 15 grounds for punitive damages or sanctions.

Mr. Kaufman does not know that there is no sancions in civil rights cases.

He is new in the field and he represents an Insurance Company -on behalf of Ebasco. Under the facts in this case sanctions is warranted. The document of intentional discharge was sent to the lawyers. The possessed it at all times. Yet it was concealed from EEOC adn in this action.

I have paid the Judgment to my client so Mr. Kaufman cannot pressure her. I wrote to N.Y. State Trial Lawyers for an opinion and I did not receive an answer. However, I am informed that payment of the Judgment by an attorney after Judgment is proper.

Finally, when asked by the panel, Mr. Kaufman stated that after assignment, my client is not the proper person to appeal,

meaning that I have the right to appeal on her behalf being fully authorized.

Recently, that issue of attorney's fees was decided by this Court. Copy of the case as appears in Law Journal is enclosed. Copy of Mr. Kaufman's letter to me is enclosed. He found the contact by my client to U.S. District Judge proper because it suited his purposes.

Respectfully,

/S/

Omar Z. Ghobashy

OZG/jn

cc- Martin Kaufman, Esq.

encl